IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

CORE WIRELESS LICENSING S.A.R.L.	)(	CIVIL DOCKET NO. 2:14-CV-912-JRG-RSP
VS.	)(	MARSHALL, TEXAS
LG ELECTRONICS, INC., ET AL.	)(	SEPTEMBER 9, 2016
	)(	2:05 P.M.

PRE-TRIAL HEARING

BEFORE THE HONORABLE JUDGE ROY S. PAYNE

UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF: (See Attorney Attendance Sheet docketed in minutes of this hearing.)

FOR THE DEFENDANTS: (See Attorney Attendance Sheet docketed in minutes of this hearing.)

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(Proceedings recorded by mechanical stenography, transcript produced on a CAT system.)

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LAW CLERK: All rise.

THE COURT: Thank you. Please be seated.

For the record, we're here for the really, really final pre-trial conference in Core Wireless versus LG, which is Case No. 6:14-912 (sic) on our docket.

Would counsel state their appearances for the record?

MR. MIRZAIE: Good afternoon, Your Honor. This is Resa Noroozi on behalf of Core Wireless from Russ August & Kabat. With me are Kayvan Noroozi and Betty DeRieux.

THE COURT: All right. Thank you, Mr. Mirzaie.

MR. MANN: Good afternoon, Your Honor. Mark Mann on behalf of LG, and with me today is Nathaniel Love, and we're ready to proceed, Your Honor.

THE COURT: All right. Thank you, Mr. Mann.

Let me see, who wants to go first as to what we need to take up today?

MR. NOROOZI: Your Honor, we'd be happy to.

THE COURT: All right. Mr. Noroozi.

MR. NOROOZI: Thank you, Your Honor.

Your Honor, at the outset, I want to clarify one point that was at issue in the email exchange or the joint email that we sent to the Court. Some of the items on our list are ones that -- are our issues that we've sort of affirmatively brought up, some of them are actually issues that LG has raised, and we'd just like to get them resolved.

And so turning to that list of issues, the first item is exhibits that we have put on our list that are numbered PTX-1692 through 1695.

The issue here breaks down as follows, Your Honor: There are two of these exhibits, 1693 and 1695, that were always on Defendants' list. And these exhibits are deposition exhibits to the deposition of Mr. Sebire, who is the inventor of the '850 patent. They were introduced at the deposition by LG.

LG has always known about the exhibits, and LG has always had the exhibits on their list until just last week. On September 1st, for the first time, LG removed the exhibits from their list after they had been pre-admitted, without any objections from us. And we have had a reservation provision on our list all along that provides that what's on their list is deemed to be on our list.

As soon as they removed the exhibits from their list, we added them to our list on September 5th on Labor Day in -- in all haste. Because they have been pre-admitted and we never objected to them and because of all the notice that LG has had about them, we don't really see what the dispute is here. LG objects to them as -- as untimely and not disclosed and -- and so forth. So we'd like to resolve that question.

And there are two other exhibits in this pile, and I can move on to them, as well, now, or we can -- I can pause

here if Your Honor has questions.

THE COURT: Are the other exhibits of the same category that they're off of the other side's list?

MR. NOROOZI: 1694 is, Your Honor. 1694 is an exhibit that was on LG's list until late July -- about July 29th. It was on their list until the third -- their third list. They voluntarily dropped that exhibit. We -- it's also a deposition exhibit to Mr. Sebire's deposition. It's something they've obviously known about in many different ways.

We had a hearsay objection to the exhibit, however, of course, the hearsay objection is that they don't have the witness. We have the witness. We're bringing Mr. Sebire. And so they dropped the exhibit before the August 12th hearing as to pre-admission. So it was not formally pre-admitted. We have not identified it as pre-admitted on our list because of that fact, but it's an exhibit that's long been known in this case and disclosed by them. And we just put it on our list, along with these other Sebire exhibits.

1692, which is the last of these four documents, is a color version of 1693, and it's much more legible and -- and easy to follow.

In addition to the fact that it has color, it has a track changes blurb on it that -- that reflects the changes that were supposed to be in 1693. And those changes are also reflected in 1694. And Mr. Sebire, obviously, is the person

who made the changes and -- and these changes are important because they show what his additions were to the existing standards. And so we have the witness to talk about it. It's the same document as 1693, except it shows the fact of the changes and it's in color.

1693 was always on their list, was pre-admitted. We never objected to it. It was a deposition exhibit. And, therefore, we'd like to be able to use 1692 with Mr. Sebire, as well.

THE COURT: All right.

MR. NOROOZI: And I have copies of these documents if the Court would like to see them.

THE COURT: If you need these documents, why weren't they on your list?

MR. NOROOZI: Your Honor, we had an understanding that -- I'm sorry, that what is on their list is on our list, and we didn't need to duplicate things on our list. One --

THE COURT: By understanding, you mean agreement?

MR. NOROOZI: We had expressed that in our exhibit list consistently from the outset. We had language at the end of our exhibit list so stating.

THE COURT: Uh-huh. And is there any agreement between the parties on that?

MR. NOROOZI: Well, it -- it's implied from LG's position that they don't accept our reservation language

because as I understand it, they're taking a position that we did not disclose these documents. Again, there's no prejudice or harm to LG. These documents are deposition exhibits that they used themselves. They have testimony on them from the inventor. And they were on their list until just last week -- at least two of the four, to be specific.

THE COURT: I'm not aware of any basis in the rules for a reservation of either the right to call the witnesses from the other side or the right to offer the exhibits from the other side. I understand that -- that that is language that frequently appears, but I think that it defeats the purpose of requiring disclosures of what you're going to use.

Now, do both sides have that language on their lists?

MR. NOROOZI: I believe that's true, Your Honor.

THE COURT: All right. Well, then let me hear from the other side.

MR. LOVE: Thank you, Your Honor. Nathaniel Love for LG.

The documents that they're seeking to add were first put on their list Tuesday morning. So we think they're untimely, but the key issue for us is cherry picking by Core of these standards-related documents. It's -- it's a central issue in this case -- these are all related to the '850 patent -- whether the '850 patent is actually essential to the standard.

And leading into the August 12th pre-trial, we had a large set of documents relating to the standards process and the '850 patent that were on our exhibit list, including correspondence among the inventors.

So Core objected to some, not all of these documents, and many of those objections were sustained, and particularly the email correspondence that we sought to introduce between Mr. Sebire, the inventor, and some other folks at Nokia. That was not pre-admitted.

And as Your Honor will recall, there were a series of standards-related documents that were -- were given an asterisks that they -- they could possibly be admitted at trial if LG took certain additional steps to prove those up.

So based on those rulings, LG made a decision to withdraw the set of standards-related documents that it sought to present. We -- we could no longer present the complete picture we had intended. So we withdrew those documents. So the -- the list -- the final list of pre-admitted exhibits, none of those asterisks documents are on it and -- and a set of other documents, including these two that they have noted were previously on our list. Those are withdrawn.

And so it's not really response for Core to say, well, these were previously on our list because it doesn't address the cherry-picking problem. If they're allowed to pick back four that they like, two ones that used to be on our list and

two other ones, including a new document that wasn't actually produced in this case until Tuesday morning or late Monday night, that's going to create, in our view, a false impression to the jury as to who contributed what to the standards.

In particular, the -- the new email that they want to add, they excluded -- they successfully got our email that we wanted excluded, and he said -- Mr. Noroozi said it was only on hearsay grounds that they had objected to our email. That's not correct. Their exhibit list objected to the email as irrelevant, as -- and as prejudicial, as well.

Secondly, on -- on this last track changes document, it's -- he noted that it's a track changes version of a document that had previously been on our exhibit list. But the problem is what -- why are they adding this track changes version? They're arguing that the track changes mean something. These track changes show that a particular change to the standard was proposed at a particular time by a particular person and that that means something.

That's a brand new concept being introduced into the case, and it goes right to the whole reason we had initially put these standards documents on. Who contributed what to the standards and when.

And we do not think it's fair for -- at this very late hour for them to be adding their own cherry-picked version of that story in, especially with brand new exhibits that were

never produced before.

THE COURT: All right. And what is your response to their argument that they have a reservation similar to the one that you have of the right to offer any exhibits from the other side's list?

MR. LOVE: So, Your Honor, the -- the last set of exhibits that they added before these were added before the September 2nd pre-trial conference. And some of those included documents that had been previously on our list that had been dropped along the way. And I asked them: Why is there a reason you're adding these?

And they said: Well, it's our understanding that you might -- you could drop exhibits and we -- these are ones we want to use, so we're adding them to our list.

So the -- the last addition of exhibits they did before the last pre-trial was not consistent with what they're saying now, which is they can go back and find anything that had previously been on our list and then select that and -- and use it.

THE COURT: And --

MR. LOVE: So I don't think there was an understanding between the parties that -- that this would actually work that way.

THE COURT: All right. Thank you, Mr. Love.

MR. NOROOZI: Your Honor, if I may?

THE COURT: You may, Mr. Noroozi.

MR. NOROOZI: Thank you, Your Honor.

So a couple of points, Your Honor, in response to what was just said. The first is that it appears that what LG really wants is to be able to use these additional documents that they've now added to their list since we made our additions. And that's - that's a separate topic that I'm very happy to address.

But the notion that there's a prejudice here or an untimeliness by us indicating formally on our list that we intend to use documents that were introduced by LG at the deposition of the inventor and have been on their list all along and that we did not object to as to two of them that were pre-admitted, the notion just doesn't really make a lot of sense to us.

THE COURT: Mr. Noroozi, the reason that bright line rules exist is because it's almost impossible to make these calls on a fairness and prejudice basis one-by-one. These documents weren't on your exhibit list before. The reservation that you're describing is simply not authorized by the rules, and -- and -- and unless you have an agreement between the parties on it, it's not effective. So I'm -- I am going to sustain the objection to the exhibits that you're now seeking to add to your list.

MR. NOROOZI: And so, Your Honor, then moving on to

the newly added exhibits that they have, I assume that the same applies, which is that since those have -- I guess I can just ask counsel for LG, are you still proposing to use those exhibits?

MR. LOVE: No, Your Honor, we're not. Those were only proposed in the event that you were going to consider pre-admitting those.

THE COURT: All right.

MR. LOVE: So we'll withdraw those.

THE COURT: Then those exhibits will be removed from the list, as well.

What's the next item?

MR. NOROOZI: The next item is the scope of LG's recently updated sales figures, Your Honor.

We asked LG for an update to their sales production so that we could update our damages, and when we received the figures, we felt that they were a bit thin, that maybe something was missing. And through meet and confer, we discovered that, in fact, there are models that have not been included in this latest set that were previously included in -- in LG's last production. And we asked -- we asked LG why that was, and -- and we've stated that we believe that obviously these models should be included.

As I understand it, LG's position is that these particular models at issue were not individually identified in

the preliminary infringement contentions as to the two patents that remain in suit.

And on that basis, they're saying that they should not be a part of Dr. Magee's supplement before trial.

There are several problems with that position. The first is that it -- it presumes a conclusion that LG is not in a position to -- to presume.

THE COURT: I -- I think I -- we discussed this before, but let me hear from them on this, and I'll give you a chance to respond.

MR. NOROOZI: Yes, Your Honor.

MR. LOVE: Thank you, Your Honor.

So the infringement contentions that they served in January 2015 provide specific lists of models, and they're defined in separate categories. And if I could, I'll just put on the ELMO --

THE COURT: But I thought the last time we were here, it was -- I made it clear that what I think your obligation is, is to update your figures, not to change them. If you -- if there are models that you don't think should be included, that's a different question than whether you are updating your figures, so I --

MR. LOVE: Understood, Your Honor. Then -- then let me move to -- to what I think responds to that point.

THE COURT: All right.

MR. LOVE: So on the ELMO, this is the email they sent us that identifies specific models that they say we need to update the sales data on. And I've gone back and looked. None of the models on there, with the exception of the second one, are in their preliminary infringement contentions at all. None of those models are in Dr. Jackson's table of his accused devices. None of those models are in Dr. Wesel's table --

THE COURT: Were they in the sales figures that you provided before?

MR. LOVE: No. None of these were, with the exception of D520BK. That one is in the update that we mostly recently provided, so they have that information.

THE COURT: But what I'm asking is were any of those models in your earlier sales figures?

MR. LOVE: No, I do not believe that they were.

THE COURT: Well, then I don't know why we're talking about them.

Let me hear from Plaintiff then. Supposedly, as I understand it, we're just talking about updating sales figures for models that were previously provided.

MR. LOVE: Yes, Your Honor. And I think that to the extent there's any confusion about it, there were -- there was the 911 portion of the case. There were phones that were only accused under those patents. There were phones that were only accused in the 912 case, and the data they've been provided,

consistent with the previous update, comes from the same list of phones we've been working with the entire time, and it doesn't include these new ones.

THE COURT: Okay.

MR. NOROOZI: Your Honor, I don't believe that part of what was said is accurate. The models at issue that have -- that do not appear on this latest production did previously appear on LG's second production of damages sales figures for the case. There were three -- there have been now three productions, at least, as I understand it.

The first set predated Dr. Magee's report and did not include these phones, I believe, because the phones had not yet been released. And so they did not appear in Dr. Magee's report.

A second set was produced after Dr. Magee had served his supplemental report, and so Dr. Magee did not issue a further supplement, knowing that he would do that before trial. And that second set of data included these phones.

But there's a broader issue here which is the scope of our --

THE COURT: Are you disagreeing with Mr. Love, or are you talking about different things?

MR. NOROOZI: I believe I'm disagreeing with Mr. Love, if I understand what he said correctly, and I believe that he said that the models at issue that don't appear in this latest

production have not appeared in previous productions, and I'm disagreeing with that point.

In addition, I'm disagreeing with the description and characterization of our infringement contentions. Our infringement contentions --

THE COURT: I understand, but that's not an issue that I'm dealing with right now.

MR. NOROOZI: Yes.

THE COURT: I -- how -- what evidence can you offer to support your position that these models were covered in the previous production since there is a disagreement on that?

MR. NOROOZI: We can provide that to the Court immediately after this hearing. We have our experts available to us, and we can just pull it from their documents to show that these models were previously part of a production.

THE COURT: All right. Mr. Love, what I'm going to ask you to do is to confer with Mr. Noroozi and see if you can figure out why you're disagreeing on that and contact the Court through Mr. Harris, and we can -- we'll set a hearing, if we have to, to resolve it, but I would expect that that's something that counsel would be able to determine, that either they have been included in prior sales figures or they haven't.

So I'm -- I'm going to pass that for now, but ask the two of you to work on that and let me know through Mr. Harris, all right?

MR. LOVE: Okay.

THE COURT: What's next?

MR. NOROOZI: Next, Your Honor, I'd like to address an issue that LG has raised with respect to Qualcomm/LG evidence used in our February expert reports.

LG is taking the position, as I understand it, that these declarations are inadmissible and hearsay for the same reasons as -- as was discussed with respect to the Qualcomm testimony in the Apple case. And we disagree strongly because it's a completely different situation. This is the exact opposite situation. These declarations were obtained from Qualcomm in this case under this Court's subpoena, and they relate directly to LG's source code -- source code build. They're all --

THE COURT: How are declarations obtained pursuant to a subpoena?

MR. NOROOZI: We subpoenaed Qualcomm, and as a part of their production in response to the subpoena, they provided these declarations.

THE COURT: Well, so you didn't subpoena the declarations, they just provided them to you in -- you subpoenaed documents?

MR. NOROOZI: I believe we subpoenaed both documents and testimony.

THE COURT: Okay. And in lieu of the testimony, they

gave you declarations?

MR. NOROOZI: That is my understanding. And in addition, we don't have the power to bring those Qualcomm witnesses to this court, so they're unavailable. And -- and they're relied on by our experts, so there's no hearsay problem in any case.

THE COURT: Tell me how that makes them non-hearsay.

MR. NOROOZI: It's -- it's -- we're not -- the experts' reliance and opinions based on the declarations are the part that I'm referring to.

THE COURT: Okay. Well, as you know, under Rule -- I guess it's 703 -- experts can certainly rely upon hearsay in order to support their opinions as long as it's the kind of information that experts in the field routinely rely upon. That does not make it admissible. That just means they can have an admissible opinion based on it.

So are you saying that you want to be able to admit these declarations before the jury?

MR. NOROOZI: Well, there are two issues. LG objects to even the utterance by our experts of opinions based on the declarations. So first and foremost, we disagree with that for the reasons Your Honor said.

THE COURT: How -- how are they going to object to that? I don't understand it. They haven't filed Daubert motions?

MR. NOROOZI: They have not filed Daubert motions, and I guess their in the best position to explain their views on this item, so I -- I -- I'm sure they could do a better job of that than I would. And I'd be happy to cede the podium for a moment if you'd like to hear that from them.

THE COURT: Okay. I'm just trying to figure out if we have a dispute that needs to be resolved.

But, Mr. Love, can you address that?

MR. LOVE: Yes, Your Honor.

The declarations at issue, they sought pre-admission of these declarations in the earlier pre-trial conference, and they were not admitted. And so our concern is this. Both Dr. Jackson and Dr. Wesel submitted supplemental expert reports that were just one page, after reviewing the declarations. What the -- the -- the sort of truth of the matter that's in the declarations is a claim that certain Qualcomm source code functions are representative -- certain Qualcomm source code functions in certain builds are representative of other Qualcomm builds for other accused devices. That's the statement that's made in the declaration.

The supplemental expert reports simply repeat that fact under the guise of an expert's opinion, but it's not an opinion that's being expressed. It's just the -- it's just the expert restating the factual claim that's made in the declaration.

And then the conclusions report is and I still believe that LG infringes. But there's no opinion that takes something from the declaration and actually draws a conclusions from it.

What we're concerned about is the use of the expert just stating the same fact that's in the declaration that was already excluded and not admitted on hearsay grounds and just curing that problem of pre-admission by having the expert say the same fact as if it's true.

And so we haven't brought a motion to strike. We're just simply expecting that their testimony of these experts at trial would be consistent with -- with the rules, Rule 702, Rule 703. And to the extent we view there's a problem with the testimony that comes in, we -- we intend to object, but we -- we didn't seek to make another motion on this.

THE COURT: And what will your objection be?

MR. LOVE: Out objection would be the expert is simply repeating the content of a declaration where the declaration was not admitted.

THE COURT: I don't think -- I'm not aware of a rule of evidence to that effect. So, I mean, you know, you've got -- pick something that starts with a No. 1 or -- or --

MR. LOVE: Or higher.

THE COURT: -- goes through 1,100. I mean, you --

MR. LOVE: Any integer? I'll take 703, Your Honor, if I may.

And I think the key there is that the -- the expert can express an opinion based on inadmissible evidence, but I don't think that's a loophole that allows an expert to simply testify as to facts that in -- in evidence that has already been excluded.

Otherwise, the exclusion -- the exercise we went through with, you know, PTX-119 -- or -- or 1619, 1650, we spent a good amount of time in this in the pre-trial and, you know, sustained an objection to those documents. But on their view it doesn't matter because their expert can just tell us what was in them anyway.

THE COURT: You know, that -- that sort of thing happens all the time. I have parties who try to introduce the expert's written report, and I exclude it because it's hearsay. That doesn't mean that the expert can't testify to what's in it. The experts rely on all kinds of things that are not admissible.

MR. LOVE: Certainly --

THE COURT: And so I -- you know, the mere fact that his testimony is going to be similar or the same as something that is in a hearsay document doesn't make it inadmissible.

MR. LOVE: Sure, Your Honor. So two responses to that.

First of all, the -- in 703, whether that underlying information can come in, the burden sort of shifts. It really

has to show that the probative value substantially outweighs the prejudice. And the prejudice in this case is these Qualcomm declarations came in after the close of discovery. The statements in here from Mr. -- Mr. Giles and Mr. -- the other ones -- I'm sorry I don't have the names with me -- we were never able to cross-examine these witnesses to test the basis of their claims and to -- and so to have something produced after the close of discovery that we've had no ability to test in a document that's been excluded to simply filter in any way under the guise of expert, I don't think is permitted under 703.

THE COURT: I think that from what I'm hearing, your real objection is to this supplemental report.

MR. LOVE: It would be to testimony -- certainly, it's fine if -- if the expert says in general the materials I've reviewed from Qualcomm affirm my opinions. But if the -- if the expert says, these Qualcomm source code builds are representative, these other Qualcomm source code builds, that particular -- just repeating that fact, that's not a new -- a new opinion. That's a factual assertion made by a Qualcomm engineer after the close of discovery that we've had no ability to test. We -- we objected to those declarations, and the -- our objection was sustained.

THE COURT: There -- there may be something to your timeliness argument, I don't know. But as far as whether an

expert can rely upon something he gets from an engineer that may be hearsay when he got it, I -- I don't think there's anything improper about that. Nothing would have prevented this expert from picking up the phone and calling the Qualcomm engineer and asking him something and relying upon it, if that's what experts in his field routinely do.

You know, the rest your argument is really about timing. And I don't -- you know, that's a -- that's another matter. But I don't see that there's anything wrong with him relying upon a declaration.

Now, if he wants to testify to the jury on direct, I got a declaration from a Qualcomm engineer and the Qualcomm engineer says this, that's hearsay. And that's not appropriate. But if he relies upon it to -- to make it his own opinion -- and it is ultimately an opinion, is it not?

MR. LOVE: As to the rep -- whether -- whether one particular source code build is representative of another build, arguably, Your Honor, that is an expert opinion.

THE COURT: That that is an opinion, right? So the question is whether it's an opinion with a proper basis. I mean, that's one question. The other question is whether it was timely --

MR. LOVE: Right.

THE COURT: -- timely provided.

MR. LOVE: And -- and in objecting to those

declarations, part of our objection in -- not only was, you know, the hearsay problem, the after discovery problem, to the extent those -- I mean, what does the word "representative" mean? What did the person who wrote that declaration mean when they said A is representative of B is something that has never been tested in the case. And -- and that's among the many reasons why we wanted those declarations excluded, and they were.

THE COURT: They are. And that hadn't changed. And if -- if anybody tries to offer those declarations, you've got a ruling that will keep them out.

MR. LOVE: Thank you, Your Honor.

THE COURT: But I -- I don't know what else you are seeking now, but anyway if -- I don't know. Is there an objection, a motion, a request, what?

MR. LOVE: Your Honor, I simply -- our position was we did not have an issue we -- we've sought a ruling from you on today. We simply expressed to -- to Core Wireless in responding to this issue they raised that we expect for their testimony to be consistent with -- with the Court's prior rulings and with Rule 703.

THE COURT: Okay.

MR. LOVE: I appreciate your -- your guidance on that.

THE COURT: All right.

MR. LOVE: And I wanted to correct one -- one issue

relating to the sales data. I went back and looked because I have the spreadsheets.

My earlier statement, I don't believe any of those models were on the initial production of sales data, which was generated based on LG's view of what the accused products were in the case. It appears that in the update provided right before the 911 trial, at least a couple of them, I haven't checked all of them, were in that production. And honestly, standing here today, I'm not sure why that is because it was my understanding that all of these have been produced from the same list, and the list is those that we had agreed were the accused products in the case.

So I certainly intend to confer with counsel, as you suggested, but we -- regardless of what's in the data, I believe the parties do have a dispute about what are the actual accused products in the case. And specifically with respect to the reports of Mr. Jackson and Mr. Wesel, which list accused products, none of these products are on their lists of accused products.

So if those products are alleged to infringe the '850 and '536 patent, nothing in discovery has told us that. Nothing in expert discovery has told us that. So we don't understand why those models could possibly be relevant to any issue in this trial.

THE COURT: And there may be some way that you should

raise that, but this is not the way. The update on the financials needs to be an update of what was provided before. So whatever those models were, that's -- that's what you need to update. And if they're the wrong models or -- then figure out what you need to do to address that, but I just -- the order will be that you provide an update for the same models that you provided in the last report.

MR. LOVE: Understood, Your Honor. Thank you.

THE COURT: Okay. Thank you.

Is there anything else that we need to take up?

MR. NOROOZI: Yes, Your Honor. There's one more item.

This item relates to some corrections to the report of Dr. Wesel who is the expert on the '536 patent, and LG has objected to the corrections as more than merely sort of typographical and syntactical cleanup, and they've filed a short motion to strike on this, a one, one and a half page document in the -- in the past few days. So I'd like to pass up a copy of -- of the corrected report and -- and walk through these items, if -- if Your Honor would allow us.

THE COURT: I have in front of me here a copy of what it says is the second corrected expert report of Dr. Wesel.

MR. NOROOZI: Yes, Your Honor. And just I can confirm we have the same thing, is it 50 -- 56 pages long, dated August 24th at the end?

THE COURT: Yes.

MR. NOROOZI: Okay.

THE COURT: And I guess -- I don't know what the nature of the dispute is, but I think that clearly the -- the Defendant is entitled to rely upon the original report. You can certainly offer that you have made these minor corrections, but if they think they are corrections that have more than -- more effect than just a typographical error, then I see no reason why they shouldn't be allowed to question the expert with the earlier version -- I guess the October 23 version, as well.

Are they contending that there is some substantive effect to these changes?

MR. NOROOZI: It's my understanding that they are, Your Honor. And so touching on your first point, we have no problem with what you described, which is that they can sort of point out to the expert that there were things that he had errors as to or -- or typographical issues with or whatnot in his previous report, as long as Dr. Wesel can explain that he's made the corrections.

LG's position, however, appears to be that a number of the corrections are more than merely typographical, and I'd like to go through them and explain why that's not correct.

THE COURT: Why don't you let them -- or maybe they've already done this to you, but just identify the ones that -- that they believe are significant, and let's focus on those.

MR. NOROOZI: I have that, Your Honor, in their motion to strike that was filed, and so they point to -- they point to Paragraphs 58, 85, 139, 172 through 174, and 181.

THE COURT: All right.

MR. NOROOZI: And so just taking them strictly in that order, if I may, Your Honor?

THE COURT: All right.

MR. NOROOZI: Starting with Paragraph 58 of Dr. Wesel's corrected report, and this is on Page 17. Here, you see in the first sentence of Paragraph 58 that he says: Preparation of TCH/AHS frames. And then in the second statement he had mistakenly typed an FS, and these keys are somewhat close together. Anyway -- but so it's clear that he was talking about AHS. I -- I don't even think there is such a thing as AFS, and so he's just fixed that.

And this is kind of illustrative of the kind of things we're talking about. I don't really understand how these are substantive and not typographical.

THE COURT: Well, why don't you let me hear from them as to the nature of their objection, then I'll give you a chance to respond.

MR. NOROOZI: Yes, Your Honor.

THE COURT: All right.

MR. MANN: Your Honor, first of all, there were other corrections, and some of them obviously were typographical, and

so we're -- we're not complaining about true typographical changes. But Paragraph 58 is a true material change. There is -- the HS is a half frame, the FS is a full frame, and that has technological significance among the experts.

And as -- when you read Paragraph 58, it's obvious -- I don't know why somebody -- if you were saying this is a TCH/AHS, you would not say preparation of TH -- TCH/AHS frames containing user information and then say the same thing again, TCH/AHS -- I mean, you wouldn't say the same thing twice the way they constructed that.

This is a material change because it makes a difference in how the signalling goes through the downlink, and I'm not here to try to explain all the technology, except to say that there is a difference of how information flows through these frames, whether it's a half frame or a full frame.

The importance of it is that, you know, during -- by giving his reports and by us deposing him, he's taking a specific position. And then by changing this -- even though it looks modest by the fact that it's just a one letter change -- it is a significant change in the technology that allows the -- the tower to connect with the receiver.

And it makes -- it's a new opinion. And it's a different opinion than what he's been deposed on or what he's written a report on. So that's why Paragraph 58 is important because it's not just a typographical correction. It is a new

opinion that -- for the first time shows up on August the 24th.

THE COURT: Well, whether it's a typographical correction or not is really a matter of who you believe. I mean, it -- it may be a typographical correction, if he, in fact, made a typographical error. But what I'm trying to understand, Mr. Mann, is how is this any different than if when he's on the stand, he says: Oh, AHS is what I meant all along?

MR. MANN: Well, I -- that is one way to look at it, and that you could say, well, you just take care of this on cross.

The problem with that is, Your Honor, we've proceeded in this case for -- since his deposition, the last time in January, that he takes the position that there's a difference between AHS and AFS in this paragraph and in the rest of his report. And by allowing him to come back now and say, oh, I really meant that this was a full frame instead of a half frame, it makes a difference in the opinions that have been expressed in the case.

And -- and it is basically a new opinion. It's not just a correction. It's a new opinion that when you're talking about this -- the source code and the use of the source code and how the information flows through digitally from the tower to the receiver, that it can be done in the same way whether it's a half frame or a full frame, and that's -- that's --

THE COURT: Well, at his deposition or anywhere else,

did he rely upon that being a full frame rather than a half frame?

MR. MANN: That's what his testimony was as -- as far as I know because that's what his report showed. When he testified, he talked about the difference between half frames and full frames.

THE COURT: In the context of Paragraph 58?

MR. MANN: Well, honest -- I didn't -- I don't have his deposition in front of me, and so I don't want to make a misrepresentation to the Court, except to say that our experts have relied upon him saying that there's -- this -- the first sentence he meant to say half frame and then the -- the second part of the sentence -- I guess what I'm saying, Your Honor, is it's not just a mistake. There's no -- I mean, if he were going to correct this sentence, then it makes logical sense in constructing this sentence that he would just drop that completely out. You wouldn't say --

THE COURT: Well, why not? One refers to frames containing user information, and the other is frames containing messages.

MR. MANN: Right. And he was saying that the half frames contain user information, and a full frame contains messages beginning in the top level function. Those are two different things. And now he's saying, well, I really meant half frames contain both of them. And so that's the difference

in the opinion. It's a material change, not just a -- not just a typographical error. I mean, that's an important point in the case. And it's just a change of opinion.

THE COURT: I think it's very difficult in a case like this to say that the expert's not allowed to say that that was a typographical error. I think, frankly, that, you know -- I understand their desire to get it out before trial because it's harder for him to say it for the first time on the stand, but have you got something -- you know, something that doesn't have the appearance of a typographical error that has been changed in here?

MR. MANN: Well, of the -- of the six par -- you're talking about the other paragraphs we complain about, Your Honor, is that what you're asking?

THE COURT: Yes, that is what I'm asking.

MR. MANN: Yes. If you look at Paragraph -- on Page 24, Paragraph 85, Your Honor.

In this situation, it's -- it's not just a typographical change. It's an addition. As you know, in your claims construction, you -- as I understand it, and, again, I don't claim to be the claims construction expert, but there are, as the Court interpreted, eight different states that we're talking about, four -- four that there are good states and bad states. And in this paragraph for the first time, he adds onset to indicate good state.

Now, that's -- that's an additional opinion. That's not just a typographical error. He's adding a new state that it -- that he says exists in this transfer of digital information that all a sudden onset now becomes a good state. He's never said that before that -- that I've seen, and it's a new opinion that he's adding another state that he's never said in the -- in his report before. He didn't testify to it. And I don't think that's in claims construction.

And so we say that's not just a typographical error, that's an addition in that paragraph.

THE COURT: All right.

MR. MANN: Your Honor, let's see, I think 43 -- on Page 43 -- I'm not trying to speak for the Court, but I think that's more in the line of -- I think more our issue here was there is a change, but as I understand it, this paragraph would be related to a claim that's been dropped. I don't know that our -- our position on Page 43 is -- that it's such a big deal that "to" has been changed to "is," but this whole paragraph staying in the report is not related to either one of the claims in the patents.

MR. NOROOZI: Should I address that now, Your Honor?

The issue here, I believe, if I may, is that our expert cites back to his discussion of Claim 1 in the context of Claim 19. And, therefore, what he has here added to Claim 1 is still relevant to his opinions as to Claim 19.

THE COURT: Okay.

MR. MANN: And I think that's our complaint really is that this would be related -- this paragraph would be related to Claim 1 and not the claim that we're going forward with on Claim 19 of '536 -- Patent '536. In other words, you shouldn't be able to testify as to expert testimony that would relate to a different claim than what we were actually trying before the Court.

THE COURT: Well, as far as the issue that I understand has been teed up on this motion, the question is whether it's permissible to offer this sort of corrections, and I haven't seen anything in here that looks to me like an attempt to back door a supplemental opinion under the guise of a correction. Even the addition of the onset state when the next paragraph or the chart, I guess, contained in that same paragraph refers to the onset state and every other state that's in that chart is addressed in his speech and that one -- in his -- I'm sorry, report, and that one is left out --

MR. MANN: But I don't -- and as I understand it, Your Honor, he's not -- he's not designating onset at that -- in this chart as good or bad.

THE COURT: Well, but his report is commenting on every state that is covered in the chart as to whether it's a good state or a bad state. And he appears to have left out onset?

MR. MANN: He has, Your Honor, and this is the first time he added it in and then testified that onset has the designation of a good state.

THE COURT: I certainly think that it's -- it's fair to cross-examine him on that, but I -- I don't see this as, like I said, a back door to get additional -- additional opinions into the record. And think you're free to cross-examine him about this and whether this indicates that he does sloppy work and should cast doubt on his other opinions, but I -- I don't see anything out of the ordinary in terms of use of a corrected report.

MR. MANN: Your Honor, I -- I understand.

Can I ask one question, Your Honor?

THE COURT: Yes.

MR. MANN: And -- and I'm -- if you look at Paragraph 181, which is on Page 51, he's changed -- he's changed one standard to another standard. I guess my argument would be we've -- we've been using one standard to understand his position, and then by changing one number, of course, he's changed -- changed the standard itself that he's using to testify.

Now, is the Court including that as a cross-examination point, as opposed to --

THE COURT: Does -- are you telling me that -- that there are two different standards? The 45.003 is a different

standard from 45.009?

MR. MANN: That's my understanding, Your Honor.

THE COURT: Well, that is certainly a more significant change than the others that I've seen. Let me hear from the Plaintiff on that.

MR. NOROOZI: Yes, Your Honor. This also really just falls in the same category of the items that you described that are fair game for cross-examination but that are true typo corrects. And the reason we know that is because Dr. Wesel's report throughout makes use of both standard sections, 003 and .009. And so if you would take a look, for example, at Paragraph 111 of his report, he says: The standard document 3GPP TS 45.003 describes how the bit pattern is placed into a transmission frame. That's one instance.

In Paragraph 116, he, again, makes use of 45.003. In Paragraph 130, he makes use of it. And I don't want to fill the record with all these paragraph citations, but it's replete throughout his report, and you can see that with a simple control F search.

And so here in Paragraph 181, he inadvertently wrote 009 when he meant to write 003. If they think that he's being dishonest when he says that that was a typo, then they can prove that up, but it's not like he's bringing in some standards section that he never talked about in his report.

THE COURT: Well, is that wherein language that

follows, is that a quote from a standard? Or is that -- that's claim language, is that the --

MR. NOROOZI: Yes, I believe he's moving on to elements of the claim there, and it's sort of just an orphan heading.

THE COURT: All right. Is there any way that they could have known from the text that that was a mistake?

MR. NOROOZI: I believe so, Your Honor, because there's detail here in this paragraph. It says: A signal received by the accused devices is received in frames apparent by the definitions of the frame structure in a standards section.

And so 45.003 is where those definitions of the frame structure exists. I have no knowledge that there's that kind of definition language in 45.009, and I have not heard that argument. And I believe they're different sections. And -- and so if you're looking for definitions of frame structure, you would know that we're talking about 45.003, especially with the other citations in the report.

In addition, Your Honor, to the extent they were confused about this issue or had doubts, they had the deposition. They didn't ask about this in his depo.

THE COURT: Well, I understand, but it's -- I'm not going to hold that against them.

Mr. Mann, do you have any response to the suggestion

that the definitions of the frame structure are in Section 003 and -- I mean -- yeah, in Section 003 and not Section 009?

MR. MANN: Your Honor, could I have 30 -- 10 seconds?

THE COURT: Yes.

MR. NOROOZI: Your Honor, and could I point to a few more sections of the report that support that proposition?

THE COURT: Well, after he --

MR. NOROOZI: Yes.

THE COURT: -- responds.

MR. MANN: Your Honor, I don't -- I don't have anything to add because that's -- that's -- between Mr. Love and myself, that's just not our area that we're presenting in the trial, so I can't deny what Mr. Noroozi is saying. So I don't want to misstate anything to the Court, except to say that obviously, the reason we didn't ask him about it in the deposition on that section is because his report showed the other standards, so...

THE COURT: Well, based on the record that I have before me, I believe that these are the sort of typographical errors that it is appropriate to correct in this fashion. And certainly, if you have further information to the contrary, that's something you can use in cross-examining him at trial. But I'm -- I'm not going to strike the corrected report.

MR. MANN: Right, Your Honor, so as I understand it,

then it just becomes -- as -- as you've stated, a cross-examination point where we can pull out the old report and compare them and, as you say, say this was sloppy work or whatever the questions may be.

THE COURT: Absolutely.

MR. MANN: Thank you, Your Honor.

THE COURT: All right. Anything further?

MR. NOROOZI: Your Honor, just one item. Going back to the exhibits that we discussed in the beginning and -- and the issue of whether they were on our list, I just wanted to add the point that although there was not a formal agreement between both sides that that reservation clause is accepted, there was also no formal disagreement as to that issue, meaning that LG never told us, if you want something on the list, put it on your list because we're not accepting this reservation language.

And so the first time we've had an occasion to test this proposition is now. And it's -- it's -- it's a very heavy penalty for us to not be able to make use of these documents that are the inventor's deposition exhibits and that describe his ideas and work.

THE COURT: If they're really important to your side, why in the world wouldn't you list them?

MR. NOROOZI: Your Honor, I think that we -- I think that in hindsight, absolutely the better course was to have

listed them, and I don't disagree with that contention or notion.

My -- my point here is that we did have a basis, in our opinion, for being able to use them --

THE COURT: You didn't see their list before you prepared yours. You -- you prepared your list that had the exhibits that you thought were important. They prepared their list, and you each included this catchall, but you could not have been relying on that catchall when you did your list unless they gave you their list before you put together yours, which would be highly unlikely.

But in any event, I understand what you're saying, and it -- it may be a penalty in that sense, but it just makes it hard for me to believe that it is a critical exhibit if you didn't think it mattered enough to include it on your list. And the system only works if we stick to the rules, and, I mean, that's the rule.

MR. NOROOZI: I understand, Your Honor. And just as a factual point, there were multiple iterations of both sides' lists, and so it's true that it was not on our initial list. It was on LG's list throughout, and -- and so that's the course of events. And -- but I -- I understand, Your Honor, and we accept your point.

THE COURT: All right. Very well. If that is all we have, then I thank you, and we are adjourned.

LAW CLERK: All rise.

(Hearing concluded.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes
SHELLY HOLMES, CSR-TCRR
OFFICIAL REPORTER
State of Texas No.: 7804
Expiration Date: 12/31/16

9/11/16
Date